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Supreme Court of the United States

October Term, 1944

No. 410

In the Matter of Proposed Reorganization of THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Debtor,

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,

Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Respondents.

REPLY BRIEF ON THE MERITS

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COURT INDEX PRESS · LAW PRINTERS · CINCINNATI, OHIO.

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REPLY BRIEF ON THE MERITS

This is a Reply to the "Brief for Respondent" filed about December 1, 1944.

For Petitioners we asked to have our Brief in support of the Petition for Certiorari stand as our Brief on the Merits. Respondent evidently seeks to have his Answer Brief in opposition to certiorari stand as his Brief on the Merits and

files his latest Brief as a supplement thereto. Our Reply Brief, (filed about October 15, 1944), in support of certiorari is therefore also to be considered on the Merits.

CONTROVERTED STATEMENTS OF FACT

Counsel profess to point out several misstatements in our Statement of the Case.

As to the first matter it is true that the foreclosure suit was brought as a result of Gurney's demands and threats, (as we also stated), but it is also true that it had become apparent that the time had arrived to dispose of the mortgaged property since, as appears in the record, none of the interested parties (the bondholders) was actively engaged the business.

Secondly, counsel deny that Gurney was seeking the control of the Company. The effect of his demands was to control. In Gurney's affidavit (R. 8) he admits having demanded the return from the Voting Trustees of a majority of the stock which of course would give him control.

The third statement claimed to be "wholly unsupported" is that the failure of the quorum at the stockholders' meetings was due to Gurney's absence. The fact is obvious. Mrs. Gurney's (the mother's) shares together with Gurney's own would be sufficient to make a quorum and it is no very great stretch of the imagination to see Gurney acting for his family just as he is now appearing for them.

AS TO FAILURE OF THE CORPORATION TO FILE PETITION FOR REORGANIZATION.

The claim of counsel is based wholly upon the assumption that there was a duty on the part of the corporation to file a

petition under Chapter X. As we have shown, (Brief p. 24), the corporation had no such duty.

But, if there was such a duty, what could have been accomplished by such action? This corporation, out of debt except for what amounted to one creditor, could accomplish nothing by proceeding under Chapter X unless by scaling down or postponing the bond indebtedness, which of course could not be done without the consent of the bondholders, and if there was such consent, no proceeding for reorganization was necessary. Besides, it must have been apparent to the corporation and its directors that the one creditor (or all of the creditors, if considered as separate creditors), would not consent to any such plan.

AS TO THE INTEREST QUESTION BEING ADJUDICATED.

It is claimed that there was no adjudication in the foreclosure suit, (in which judgment was rendered before these proceedings were begun), because the interest "was never in issue or litigated in the state court proceeding." The cases cited are not in point for each only held that the particular matter in question was not involved or determined in the earlier case and therefore was not res judicata. One of the cases, *Cromwell* v. *County of Sac*, 94 U. S. 351, 353, expressly held that where a cause of action is adjudicated, there is an absolute bar as to every defense presented or that might have been presented. Interest was claimed in the foreclosure case in the state court and was necessarily involved and adjudicated when a judgment was rendered for the amount found to be due. It certainly was adjudicated as to the Company and therefore as to the stockholders.

SOLVENCY OF THE COMPANY.

The reference of counsel (R. 67) shows that the bondholders, (or at least those for whom Enoch J. Price, a member of the Bondholders' Committee, spoke), were willing to accept payment "at a heavy discount." This added to the fact that the bondholders were surrendering their bonds at ten to twenty-five cents on the dollar of principal is strong indication that the corporation was not able to pay its debts.

"A POSSIBLE METHOD OF REORGANIZATION"

Under this head counsel contend there is nothing in the record disclosing that additional capital is necessary. It is certain the Company cannot go on without either the use of the mortgaged property (which is the whole of the plant and assets of the Company) or the supplying of additional capital to pay the bonds. It is also perfectly plain that the stockholders will not supply this additional capital or they would have long since settled with the bondholders "at a heavy discount."

Counsel (perhaps unwittingly) settle the whole matter by saying it is possible a new mortgage could be procured to pay the principal and interest of the present mortgage, in which event consent of the bondholders would be unnecessary. That is the point of the whole controversy. Such possibility ought to be promptly explored and if capital could be secured no reorganization would be necessary or called for. If it cannot be secured the non-consent of the bondholders prevents reorganization.

Respectfully submitted,

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